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No. 08-355

Supreme Court, U.S.
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In The
# Supreme Court of the United States

NANCY A. BURNS STRATTON,

*Petitioner,*

v.

BOARD OF COUNTY COMMISSIONERS
OF SARASOTA COUNTY, FLORIDA,

*Respondent.*

**On Petition For Writ Of Certiorari To The Florida Second District Court Of Appeal**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Whether Petitioner has presented a compelling reason for certiorari review based on a Florida trial court's statement admonishing Petitioner for failure to cite any case requiring analysis of the interconnected, or cumulative, effect of multiple regulations applied separately over a period of time to a takings claim, rather than each regulatory action individually as they relate to Petitioner's various theories of recovery.

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## CITATIONS TO OPINIONS BELOW

The decision of the Second District Court of Appeal of Florida for which review is sought is reported as *Stratton v. Board of County Commissioners of Sarasota County, Florida*, 983 So.2d 590 (Fla. 2d DCA 2008) (Table). Rehearing was denied on June 19, 2008. That opinion affirmed, without written opinion, the final judgment of the Twelfth Judicial Circuit Court for Sarasota County, Florida.

## BASIS FOR JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254 (1988).

## CONSTITUTIONAL PROVISIONS

U.S. CONST., amend. V.

U.S. CONST., amend. XIV, § 1.

## STATEMENT OF THE CASE

This case involves a dispute between Nancy A. Burns Stratton ("Stratton") and the Board of County Commissioners for Sarasota County, Florida ("the Board" or "the County"). Stratton claims that the Board inversely condemned her beachfront property.

In the early 1970's, artist Sydney Solomon commissioned the construction of a beachfront house for his property located at 9210 Blind Pass Road, Sarasota, Florida. R. 2097-98, 4400-03. Blind Pass Road runs parallel to the Gulf of Mexico near the southern tip of Siesta Key. R. 2097-98, 4400-03. After construction, the Solomon house consisted of two three-story structures oriented tandem and perpendicular to the shoreline. R. 1547, 1557. A courtyard occupied the space between the two structures at ground level. R. 2097, 3085. A foot bridge connected the second story of each structure. R. 2097, 3085. The seaward structure included the living quarters and fronted the Gulf of Mexico. R. 2097, 3085. The landward structure included an artist's studio and fronted Blind Pass Road. R. 2097, 3085.

At the time the house was constructed, approximately 250 to 300 feet of beach separated its seaward portion from the Gulf. R. 4919-20. A significant portion of the beach eroded during the 1970's and 1980's. R. 1520-37. Without question, this beachfront property is and has been subject to a highly regulated environment consisting of constitutional provisions regarding the public trust in shoreline property, state and federal statutes and regulations, and local ordinances. Tr. 1264-74; *see also* Article X, Section 11, Florida Constitution; 16 U.S.C. Chapter 33 (1990) (Coastal Zone Management Act of 1972, as amended); 44 C.F.R. § 60.5 (1984) (FEMA regulations for flood and erosion prone areas, as amended); Chapter 161, Part III, Florida Statutes (2008) (coastal zone protection);

Fla. Admin. Code Chapter 62B-33 (rules and procedures for coastal construction seaward of the coastal construction control line and fifty-foot setback); Chapter 54, Article XXI, of the Code of Ordinances of Sarasota County, Florida (Coastal Setback Code, f/k/a Gulf Beach and Barrier Island Setback Code).

In the early 1990's, Sydney Solomon and his wife sold the subject property to J. Gordon Rubin and Phyllis Rubin. Tr. 831, 956; R. 3103, 3138-39, 3142-43. During the time the Rubins owned the property, the shoreline continued to erode and eventually damaged the seaward portion of the house. R. 1520-37.

In 1999, the Rubins made several repairs to the seaward structure, and used steel pins to stabilize its foundation. R. 8501-03, 8622-23. The State of Florida Department of Environmental Protection ("DEP" or "the Department") granted permission to repair the foundation and superstructure. Tr. 688-89; R. 8348-8352. However, the Department added as a caveat to its permit that Department staff "would not recommend approval of any future request for the construction of a coastal or shore protection structure on the property for the protection of the dwelling structure." Tr. 688-89; R. 8348-8352. The total cost of the repairs, combined with other prior repairs within the five years prior, was slightly less than 50% of the total value of the home. R. 2276, 3018.

In September 2000, an engineer again found erosion damage to the seaward portion of the residence.

Tr. 506, 1529; R. 5569-71, 8505, 8610-21, 8624-25. The engineer informed the Rubins about the dangerous conditions on the property, and urged them to move the seaward structure further landward. R. 5570-71, 8624-25. The engineer also reported the dangerous conditions to Sarasota County. R. 5569-71, 8553.

In October 2000, the County issued a warning to the Rubins that the seaward structure was unsafe, and that they had to take corrective measures. Tr. 464-65, 506; R. 5567-68. The County issued the warning because the scour effect of tidal surge was causing sand to erode from under the pad footing and slab system, exposing the pin piles underlying the seaward structure. Tr. 513, 1531; R. 5567-68. Because the pin piles were exposed to the elements, the seaward structure was in danger of dropping, cracking, and further settling as a result of the void created by the erosion of sand underneath the pad footing and slab. Tr. 513, 1531-32, 1538.

On November 13, 2000, the Rubins and Nancy Burns Stratton ("Stratton") entered into a contract for sale of the property for $800,000. R. 3088-93. Stratton received a "Seller's Property Disclosure Statement" which noted that there was "recurrent high water into courtyard" and that the home's privacy walls and lower level breezeway were or had been damaged. R. 3101-03. The disclosure statement also disclosed that erosion had occurred at the foundation, and that corrective action included the installation of steel pins driven into the bedrock. R. 3101-03.

Stratton subsequently learned of a recorded deed restriction for the property which stated, in part, the following:

> Due to the extremely close proximity to the mean high water line, the permittee agrees to remove the dwelling structure and its foundation from the property upon notification from the Department of Environmental Protection staff that one or more of the seaward most pilings of the dwelling have become situated seaward of the mean high water line and that the moving of said mean high water line occurred in a manner such that by the laws of the State of Florida, the State would have gained title to said land.

R. 8463-67, 8492.

Stratton's contract with the Rubins included contingencies for county and state approval to relocate the seaward structure, and installation of a rock revetment. R. 8484-88. When the time came to cancel the contract under the above contingency, on December 14, 2000, Stratton waived the original contingency and replaced it with a new contingency clause:

> This Contract and Buyer's obligations under it are conditioned upon Buyer receiving written conceptual approval by the State of Florida and the County of Sarasota regarding the relocation and repair of the existing structure, and construction of an appropriate shore protection structure (wall) and further conditioned upon the satisfactory resolution of the Notice of Unfit or Unsafe Structures

> and Order to Correct Issued by Sarasota County on October 30, 2000. This contingency must be fulfilled or waived by Buyer within 45 days following the full execution of this Amendment. If the contingency is not fulfilled or waived by Buyer within 45 days, then the Contract shall be terminated, the parties relieved of further obligations under it, and Buyer's earnest money deposits shall be returned to Buyer.

R. 8493. Stratton could have terminated the contract and received her earnest money under this clause by as late as February 21, 2001. R. 8454, 8494. After this date, she could have walked away from the deal, losing only her earnest money $25,100. R. 8458. Stratton nevertheless waived these conditions and went forward with the purchase of the property. R. 8494.

On March 26, 2001, the County issued a condemnation order alerting the Rubins that the County planned to demolish the seaward structure. Tr. 125; R. 2101-02, 4349-50, 5608-09. Contrary to Stratton's contention otherwise in her petition, the condemnation order did not solely concern the demolition of a utility chase. R. 2101-02, 4349-50, 5608-09. Rather, the condemnation order states, "In accordance with Sarasota County Code Section 22-34(3), the seaward portion of the residential structure located at 9210 Blind Pass Road is condemned." R. 2101-02, 4349-50, 5608-09. The County recorded the condemnation order in the official records of the clerk of the circuit

court, and copied Stratton with the condemnation order. R. 2101-02, 4349-50, 5608-09.

On May 4, 2001, Stratton closed on the property. Pet. App. D, p.29. Stratton wanted to leave the seaward structure at its location in the surf and sought historic designation for the home. R. 2183-86. Historic designation would have given Stratton an exemption to a cumulative repair rule which requires lifting the structure to FEMA base flood elevation after repair costs exceed 50% of the home value over a five-year period. R. 2099, 2846, 3019, 8146-47. Contrary to Stratton's statements in her petition, historic designation alone would not have ensured that the structure could remain in place, nor prevent its demolition as an unsafe structure. Any construction activities for repairs would still need County approval through a coastal setback variance and a building permit to ensure compliance with the Florida Building Code.

The County stayed its demolition of the seaward portion of the house pending Stratton's appeal of the condemnation order to the Sarasota County Building Code Board of Adjustments and Appeals. R. 1756. During the interim, Stratton filed preliminary paperwork for a building permit to fix the house, but never completed the necessary wind load or hydrodynamic analyses portion of the application. Tr. 1557-68.

On June 26, 2001, the County's Historic Preservation Board recommended that the Board of County

Commissioners approve historic designation for the home. R. 2847-2901. The Board of County Commissioners was scheduled to hear Stratton's application for historic designation on July 10, 2001, but continued its final decision on the matter pending the outcome of the Stratton's coastal setback variance application and her administrative appeal of the County's condemnation order to the County's Building Code Board of Adjustments and Appeals. Tr. 795; R. 2982-85; Pet. App. D, p.35.

On July 25, 2001, the Board denied Stratton's application for a coastal setback variance to make repairs to and construct a seawall for the seaward structure because it did not satisfy the variance criteria set forth in section 54-724 of the Code of Ordinances of Sarasota County, Florida. R. 2125-44, 4989. During the public hearing concerning the application, County staff provided a detailed presentation about the proximity of the seaward structure to the Gulf and the adverse environmental impact that would be caused by Stratton's proposed seawall. Pet. App. D, pp.9-10. At 6.3 feet NGVD[1] elevation, the proposed seawall would have offered only limited protection to the foundation of the seaward structure, and only under the most minor of storm events. Tr. 1205-06, 1570. Wave forces would have overtopped the seawall and crashed into the house during these

[1] NGVD stands for the National Geodetic Vertical Datum of 1929. It is a universally recognized measurement of elevation or attitude above, and depression or depth below, mean sea level.

storm events. Tr. 1205-06, 1570. Because the seaward structure was already located in an area repeatedly subject to wave action, construction of the proposed seawall would have adversely affected the neighboring parcels as a result of wave energy reflected off its surface. Tr. 1195-96.

Contrary to Stratton's contention in her petition, the proposed seawall was fundamentally different from any other coastal setback application previously received by the County. Tr. 1315-38. Stratton's proposed use of a vertical aluminum seawall to protect a home that already sits in an active tidal area is not a use granted by the County to similarly situated owners. Tr. 1315-38.

Finally, the Board's resolution denying Stratton's variance application indicated that other variances less intrusive on the public's rights and more appropriate to the long term were available, stating, "Adequate land is available to relocate the proposed residential structure as much as 27 feet further landward on the property and on a new pile foundation, or in line with other nearby development through the demolition and reconstruction of the structure further landward." R. 2366-67, 4932-36, 4958-59. The resolution also noted that its decision pertained only to the application in front of it, and specifically left open the possibility that a different variance proposal might be approved under the right circumstances by relocating or removing the seaward structure. Pet. App. D, pp.6-7. Stratton did not seek review of the validity of the Board's denial of her

coastal setback variance application in state circuit court.

On October 9, 2001, the Board of County Commissioners again continued Stratton's application for historic designation. Pet. App. D, p.36. The Board continued the matter because Stratton's administrative appeal of the condemnation order was still pending with the Building Code Board of Adjustments and Appeals. Pet. App. D, p.36.

Due to its proximity to the Gulf of Mexico and unstable condition, the house attracted visits by curiosity seekers. Tr. 1606-07. This attention triggered concerns for public safety. Tr. 1606-07. The Building Code Board of Adjustments and Appeals denied Stratton's administrative appeal of the condemnation order on November 14, 2001. Pet. App. D, p.31. Stratton subsequently sued the County in a Florida circuit court to challenge the validity of the condemnation order, Pet. App. D, p.31, but later stipulated to the dismissal of that lawsuit without prejudice.

On November 19, 2001, Stratton sent correspondence to County staff about a new variance application. R. 5556. County staff advised Stratton in December 2001 that she could not submit the exact same seawall application for Board consideration, based on the principle of administrative res judicata. Tr. 1312; R. 5559.

The Board denied Stratton's application for historic designation status for the home on December

11, 2001. Pet. App. D, p.36. Stratton subsequently sued the County in a Florida circuit court to challenge the validity of the denial of the historic designation, but later stipulated for dismissal of that lawsuit with prejudice.

In her petition, Stratton contends that the Board of County Commissioners had never before rejected the Historic Preservation Board's recommendation for historic designation. Tr. 778-819. However, as pointed out by the County's historic preservation specialist, the Board of County Commissioners is not required to follow the recommendation of the Historic Preservation Board under the Sarasota Code of Ordinances, and could have legitimately denied the application because it did not meet code criteria. Tr. 813-14. Further, historic designation did not necessarily mean that the existing use of the house at its location in the active surf would continue. Rather, the Board could have granted historic preservation status, yet conditioned approval on elevating the structure to FEMA requirements. Tr. 814.

With the assistance of County staff, Stratton applied for a Flood Mitigation Assistance grant on March 28, 2002. R. 8788, 8797. The Federal Emergency Management Agency ("FEMA") established the grant program to reduce or eliminate payouts associated with buildings and other structures otherwise insurable under the National Flood Insurance Program with a history of repetitive loss. Stratton's property had previously sustained losses on at least twelve occasions, totaling nearly $500,000 in flood

damage since 1985. R. 8822. On March 11, 2003, FEMA approved a grant of $980,000 to purchase the property, with approximately $735,000 to be paid by FEMA, and the remaining $245,000 possibly deriving from state or local sources. R. 8802.

In early March 2003, beach erosion finally led to the partial collapse of the seaward structure. Tr. 1609-11. Because of the partial collapse, the County then issued an emergency demolition order, and took immediate steps for demolition. Tr. 142, 1609-11; R. 5608-09. The demolition was completed shortly thereafter. Tr. 1313.

On April 8, 2003, Stratton appeared before the Board of County Commissioners and asked for assistance to protect the landward structure and the remainder of her property. Tr. 1312-13. The Board indicated its desire to help Stratton, encouraged her to file another application, and directed County staff to bring the matter before the Board at the earliest opportunity once the application was complete. Tr. 1313. Stratton thereafter met with County staff, but neither she nor her consultants ever submitted a new coastal setback variance application. Tr. 1314-15.

In August 2003, FEMA provided a letter outlining its acquisition offer to Stratton for purchase of her property as follows:

> Our acquisition offer acknowledges the pre-demolition Fair Market Value of the home reflected by Ms. Burns purchase price in May of 2001. The offer, prepared in December

> 2002, provides a 10% annual appreciation in real estate value for 18 months, or $920,000, together with $50,000 for demolition, and $10,000 for environmental permits, legal fees, and closing costs.

R. 8822-23. FEMA also offered to reevaluate the grant awarded "if the actual purchase price exceeded $800,000, if costs have risen, if the actual appreciation in real estate value in that neighborhood is exceeding 10% per year, or if additional months of appreciation are warranted." R. 8223. Stratton never accepted FEMA's offer. R. 8805-06. FEMA rescinded its offer on January 6, 2004. R. 8805-06.

During the summer of 2004, a number of storms (including Hurricane Ivan) passed through the Gulf, causing additional erosion. Tr. 1641-42; R. 8883. County staff inspected the landward structure on September 16 and 17, 2004, and discovered that as a result of its weak foundation, the structure was unsafe and imminent danger of collapse. Tr. 1641-1653; R. 8894, 8920. In its weakened state, the landward structure posed a threat to an adjacent home. Tr. 1612-13, 1653. The County issued an emergency condemnation order for the landward structure on September 23, 2004, and redelivered its emergency condemnation order to Stratton on September 30, 2004. Tr. 1654-55, 1661. The County subsequently demolished the landward structure on October 27, 2004. Tr. 151.

**Florida Circuit Court:** On June 18, 2004, Stratton sued the Board of County Commissioners of

Sarasota County. R. 1-331. The initial complaint contained the following six counts: (1) procedural due process rights violation associated with the Board's quasi-judicial hearing on Stratton's application for historic designation status; (2) substantive due process violation associated with the Board's denial of Stratton's application for a coastal setback variance; (3) equal protection violation associated with the Board's denial of Stratton's coastal setback application; (4) inverse condemnation of the property through physical invasion; (5) inverse condemnation of the property through regulation; and (6) compensation for "inordinately burdening" the property under the Bert J. Harris, Jr., Private Property Rights Protection Act, §§ 70.01 et seq., Florida Statutes. R. 1-331.

On February 23, 2005, the trial court involuntarily dismissed Count II (substantive due process). R. 782. On December 27, 2005, the Board moved for partial summary judgment as to Count I (procedural due process) and Count III (equal protection), reasoning that a person cannot simultaneously challenge the validity or propriety of a government's action while at the same time seeking inverse condemnation. R. 1214-42; *see also Key Haven Assoc. Enter., Inc. v. Board of Trustees*, 427 So.2d 153, 156 (Fla. 1983). On January 18, 2006, Stratton voluntarily dismissed with prejudice Counts I and III. R. 1321.

Stratton's third complaint, filed on January 23, 2006, contained three of the six remaining counts: (1) inverse condemnation by physical appropriation;

(2) inverse condemnation by regulation; and (3) violation of the Harris Act.[2] R. 1323-1737. Stratton further alleged that the Board, through its regulatory and police powers, caused the destruction of her home, the devaluation of her remaining land, and limited her use of the property in order to create public beach access. R. 5038-55.

The case went to trial in the Twelfth Judicial Circuit Court for Sarasota County, Florida, and took ten days to complete (April 24-28, May 30-June 2, June 9, 2006). Tr. 1-1850. Sixteen witnesses testified, many of whom were experts. Tr. 1-1850. More than 100 documents and exhibits were placed in evidence. R. 2728-6024. During the trial, Stratton conceded that both structures were unsafe at the time of their demolition by the County. Pet. App. B, p.12.

On August 11, 2006, the trial court entered a Final Judgment for Sarasota County on all of Stratton's claims. Pet. App. B, p.3. The trial court found that Stratton did not prove her inverse condemnation or Harris Act claims. Pet. App. B, p.3. The trial court also found that Stratton did not prove that the Board was motivated into its actions by any desire to take her property for beach access. Pet. App. B, p.3. Rather, the evidence demonstrated that the Board

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[2] In her petition for writ of certiorari to this Court, Stratton confuses the "inordinate burden" standard set forth in the Harris Act with the analyses used to determine whether the government has completed an inverse condemnation.

was motivated by the adverse environmental impacts of Stratton's proposed seawall, the danger of erosion to adjacent properties, the inability of the seawall to protect the home from continuing wave impact, concerns about the structural integrity of the seaward structure, and alternatives that caused less impact to coastal systems. Pet. App. B, p.10.

Next, the trial court found no categorical taking by regulation because the evidence did not establish that application of the coastal setback code deprived Stratton "all economically beneficial use" of her property. Pet. App. B, pp.11-12. The property still can support the construction of a 3,330 to 4,050 square foot single-family home. Pet. App. B, p.11. The trial court also concluded that even if no economic beneficial use existed for the property, the application of the coastal setback code was not the proximate cause of that loss. Pet. App. B, pp.11-12. The application of the code did not directly cause the continued erosion of the property and subsequent loss of use. Pet. App. B, pp.11-12.

The trial court also rejected Stratton's argument of a categorical taking through physical invasion. Pet. App. B, pp.12-13. Stratton did not follow through on any legal action challenging the validity of the demolitions and conceded that both structures were unsafe at the time of their demolition. Pet. App. B, p.12. The trial court reasoned that no taking by physical invasion occurred because the government may enter onto land to abate a public nuisance, and that the removal

of an unstable beachfront structure eliminates a public hazard to beachgoers. Pet. App. B, p.13.

Using the factors first outlined in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), the trial court conducted an *ad hoc* inquiry as to whether the County had taken the property. Pet. App. B, pp.13-22. The trial court first considered the character of the Board's action in denying the coastal setback variance, specifically, whether the Board's action went beyond the type of regulation that is a cost all citizens must pay for living in an organized society. Pet. App. B, p.14. The trial court found that the Board's application of the coastal setback code produced no disproportionate burden on Stratton. Pet. App. B, p.14. Rather, Stratton's property was uniquely compromised due to its proximity to the Gulf of Mexico, and therefore she should have expected an amplified effect from application of the code. Pet. App. B, p.14.

Continuing its *Penn Central* analysis, the trial court concluded that Stratton's investment-backed expectations concerning the value of her property were manifestly unreasonable. Pet. App. B, p.15. The trial court first reasoned that the coastal setback code had been enacted prior to Stratton's purchase of the property, and that this fact weighed heavily against Stratton's claims. Pet. App. B, pp.15-16. Next, the trial court observed that Stratton had actual knowledge of certain facts and events at the time she made her investment, including facts revealed in: (1) the Seller's Property Disclosure Statement; (2) the recorded

deed restriction; (3) the DEP permit caveat; (4) the Notice of Unsafe or Unfit Structure issued by the County; (5) the purchase contract contingency clause; (6) County staff objections to repairing the seaward structure at grade; and (7) the condemnation order for the seaward structure, which Stratton received on the same day the Historic Preservation Board recommended that the Board of County Commissioners approve historic preservation status. Pet. App. B, pp.16-19.

Citing primarily *Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56 (Fed. Cl. 1997), the trial court rejected Stratton's argument that she had an objectively reasonable expectation of receiving a variance because the Board had previously granted variance approvals for construction of seawalls. Pet. App. B, pp.20-21. The trial court reasoned that prior permissive conduct by Government in its administering regulations does not affect investment-backed expectations because Government could enforce regulations in a more stringent fashion if it so chose. Pet. App. B, p.20.

Under the third factor of the *Penn Central* analysis, the trial court evaluated the economic impact of the application of the coastal setback code, and determined that due to the precarious condition of Stratton's home, it is only logical that she stood to lose more economic value than her neighbors might lose through regulation. Pet. App. B, p.21. The trial court also found that although the coastal setback code may have prevented the use of part of the property, the

property can still support a single family home. Pet. App. B, p.21. The trial court concluded that Stratton's lot remains a valuable asset as a whole. Pet. App. B, p.21.

Thus, the trial court concluded that Stratton's inverse condemnation claim failed under a theory of the doctrine of unconstitutional conditions, Pet. App. B, p.11, failed under a theory of categorical taking by regulation, Pet. App. B, pp.11-12., failed under a theory of categorical taking by physical invasion, Pet. App. B, p.13. and failed under every prong of the *ad hoc Penn Central* analysis. Pet. App. B, p.22. The trial court also concluded that Stratton did not prove an inordinate burden under the Harris Act. Pet. App. B, pp.22-24. Thus, the County prevailed on all claims.

**Florida Appellate Court:** On September 7, 2006, Stratton appealed the trial court's final judgment to the Second District Court of Appeal of Florida. In her initial and reply briefs, Stratton raised four issues:

> (1) Did the trial court err in concluding that the County's denial of Appellant's petition for historic designation was not the proximate cause of her loss and therefore her property was not "inordinately burdened" within the meaning of the Harris Act?
>
> (2) Did the trial court err in concluding that Appellant failed to establish a regulatory taking under the ad hoc analysis of *Penn Central Transp. Co. v. City of New York*?

(3) Did the trial court err in concluding that Appellant failed to establish a categorical taking by regulation or physical invasion?

(4) Should the trial court's final judgment be reversed because it is internally inconsistent and its findings are irreconcilable?

The Second District Court of Appeal heard oral argument on December 5, 2007, and issued a "per curiam affirmed" decision without written opinion on April 25, 2008. Pet. App. A, pp.1-2. The Second District also denied Stratton's motions for rehearing, rehearing on banc, and for certification of question to the Florida Supreme Court on June 19, 2008. Pet. App. C, p.26.

## REASONS FOR DENYING THE WRIT

### I. Stratton has not demonstrated a compelling reason why the writ should be issued.

Supreme Court Rule 10 states that "a petition for writ of certiorari will be granted only for compelling reasons." *Id.* Rule 10 also provides several factors the Court considers in deciding whether a compelling reason exists to issue the writ.

First, Rule 10(a) states that the Court may find a compelling reason to issue a writ as to certain decisions made by a United States court of appeals. *Id.* Here, Stratton takes issue with a decision by a Florida trial court. Thus, the instant case is unlike those envisioned by Rule 10(a).

Next, Rule 10(b) discusses those situations wherein "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals." *Id.* Again, Stratton takes issue with language contained in the final judgment of a Florida trial court, and not language in a decision on an important federal question by a state court of last resort. The Second District Court of Appeal of Florida made no comment on any important federal question, but rather per curiam affirmed the trial court's final judgment without written opinion.

Finally, this case is not one which falls within the situation described in Rule 10(c) wherein "a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* Although Stratton cites *Tahoe-Sierra Preservation Council, Inc. v. Tahoe*, 216 F.3d 764, 783 n.33 (9th Cir. 2000) for the proposition that "there is little discussion of a 'causation' requirement in any of the case law involving regulatory takings," she does not actually argue in her petition that the issue of multiple causes has been left unresolved by this Court or other courts. As outlined in *Tahoe*, courts agree that a proximate cause analysis in a takings case is akin to other 42 U.S.C. § 1983 cases.

The only remaining inquiry is whether the trial court's decision in the instant case "has decided an important federal question in a way that conflicts with relevant decisions of this Court." A "federal question" is "a legal issue involving the interpretation and application of the U.S. Constitution, an act of Congress, or a treaty." BLACK'S LAW DICTIONARY 646 (8th ed. 2004). Here, the legal issue does not directly involve an interpretation and application of the U.S. Constitution, an act of Congress, or a treaty. Rather, it involves the application of the common law concept of proximate cause as it relates to a taking claim under the Fifth and Fourteenth Amendments. Thus, Stratton seeks nothing more than a reversal of what Rule 10 describes as a "misapplication of a properly stated rule of law," i.e., misapplication of the common law precedent concerning the concept of proximate cause. *Id.* Because this case cannot be characterized as one that meets the guidance criteria of Rule 10 and is otherwise unremarkable, this Court should deny issuance of the writ.

## II. Stratton's petition does not identify when the federal question was raised with the state appellate court.

Supreme Court Rule 14(g)i. requires Stratton to specifically identify "the stage in the proceedings, *both in the court of first instance and in the appellate courts*, when federal questions sought to be reviewed were raised. . . ." *Id.* (Emphasis added.) Her petition did not identify when and how she raised the issue of

proximate cause as to her inverse condemnation claim with the state appellate court.

If Stratton did not present the alleged error in the proximate cause analysis as to her claim of inverse condemnation to the state appellate court, this Court will have to dismiss her case for lack of jurisdiction even if certiorari review is granted. *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). "When the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Board of Directors of Rotary Intern. v. Rotary Club of Duarte*, 481 U.S. 537, 550 (1987).

In the state appellate court, Stratton alleged an error in the analysis of proximate cause involving her state claim under the Harris Act, but did not allege an error in the trial court's proximate cause analysis of her inverse condemnation claim. A casual reference to an issue, in the midst of another argument, is insufficient to inform a state court that it has been presented with a federal question subject to the jurisdiction of the Court. *Id.* at n.9. Thus, this Court does not have jurisdiction to hear Stratton's case.

## III. The trial court's proximate cause analysis is consistent with that used by other courts.

In every inverse condemnation case, there must be some causal connection between government conduct and the plaintiff landowner's damage. *Souza v. Silver Development Co.*, 210 Cal.App.3d 165, 171 (Cal. Ct. App. 1985). As noted in *Souza*, tort law defines proximate cause in terms of foreseeability, whereas inverse condemnation cases impose liability without regard to foreseeability. *Id.* at 171 n.3. Accordingly, a proximate cause determination in an inverse condemnation case should be thought of in terms of "substantial" causation. *Id.* at n.3. "Substantial" causation means a showing of a substantial cause-and-effect relationship between the government action and the injury that excludes the probability that other forces alone produced the injury. *Id.* at 171. A government may be liable even where one of its actions was one of several "substantial" concurring causes which contribute to a taking. *Id.*

The *Souza* court's substantial causation test is consistent with that used by the federal courts, including this Court, wherein a takings claim cannot succeed if the challenged government action caused only indirect or "consequential" injuries. *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923); *Klein v. United States*, 375 F.2d 825, 829 (Ct. Cl. 1967).

Here, the trial court's approach to Stratton's takings claim was a rational one that reviewed each

regulatory action individually to determine whether there was a direct cause-and-effect relationship between the regulatory action and the alleged injury which excluded the probability that beach erosion alone produced the injury to Stratton's property. As noted by this Court, an owner of land bounded by a body of water with a dynamic shoreline gains and loses property by the actions of the water body and is not entitled to relief from the government if the land naturally erodes, because that gain or loss is an antecedent element of the property which inheres in its title. *See Banks v. Ogden*, 69 U.S. 57, 67 (1864) (holding that the owner of land bounded by the sea sustains the burdens of losses naturally imposed by the contiguity of waters). For this reason, where erosion is a natural phenomenon, a landowner does not demonstrate the necessary direct and proximate cause necessary to sustain a regulatory takings claim where the only government action is denial of a permit. *Souza*, 210 Cal.App.3d at 172; *Rains v. Washington Dept. of Fisheries,* 575 P.2d 1057, 1057 (Wash. 1978). Because the trial court's causation analysis is consistent with other court decisions involving erosion along an ephemeral shoreline, this Court should deny the petition.

## IV. Stratton's petition contains several misstatements of fact that bear on the issue of proximate cause if certiorari were granted.

In her petition, Stratton erroneously argues that "by denying historic designation that had been

granted to all who had ever applied for it for all other properties, Sarasota County caused the nuisance it later claimed to abate. . . ." Pet. at 6. This is incorrect. The County condemned the seaward portion of Stratton's house as an unsafe structure in March 2001. Stratton did not apply for historic designation until May 2001. The Board did not deny the historic designation application until December 2001. Therefore, the nuisance pre-dated any action by Stratton or the Board. Stratton cannot disavow that the structure constituted a nuisance at that time because she never followed through on a lawsuit challenging the validity of the condemnation order. Further, Stratton cannot raise any equal protection arguments with this Court, because the propriety of the Board's action must be challenged separately from an inverse condemnation lawsuit, and because Stratton dismissed with prejudice her equal protection claim in the trial court.

Next, Stratton wrongly claims that the Board "precluded her from getting the automatic exemption for historic designated properties which would have allowed her to exceed the $12,000 FEMA spending cap and defend her home from further erosion." Pet. at 6. Stratton's argument suffers from the *post hoc* fallacy. Receipt of historic designation alone would not allow Stratton to defend her home from further erosion. Without a coastal setback variance and building permit, Stratton could not make any repairs or construct a seawall.

Finally, Stratton claims that a "cascading series of events created the Catch-22 that resulted in the

County later, after lengthy delay, denying Stratton a seawall permit which it had regularly granted to her neighbors because her property had eroded too much because of the County's original denial and consequent limitation to the $12,000 FEMA spending cap." Stratton does not explain what she means by a cascading series of events, or what she means by a "Catch-22" scenario.

If Stratton is suggesting that the delay in review of her historic designation application adversely influenced the Board's review of her coastal setback variance application, then that argument again suffers from the *post hoc* fallacy. As outlined in the trial court's final judgment, the Board denied Stratton's coastal setback variance application for a seawall due to the adverse environmental impacts attributable to the construction of the proposed seawall, the danger of erosion to adjacent properties, the inability of the seawall to protect the home from continuing wave impact, concerns about the structural integrity of the seaward structure, and alternatives which provided less impact to coastal systems. Therefore, it does not follow that approval of Stratton's historic designation application on July 10, 2001 necessarily would have influenced the Board's decision whether to grant or deny the coastal setback variance application on July 25, 2001.

If the Board had granted historic designation status on July 10, 2001, then the Board would simply have reviewed a variance application to build a new seawall for an *historic* structure, rather than one

without such a designation. The fact that the structure may have been recognized as historic does not factor in the Board's analysis of Stratton's seawall application under the coastal setback ordinance. Section 54-724(a) of the Code of Ordinances of Sarasota County, Florida, states:

> The Board of County Commissioners of Sarasota County after a public hearing may grant variances which would permit construction and/or excavation seaward or landward of the Gulf Beach Setback Line or waterward or landward of the Barrier Island Pass Twenty-Year Hazard Line if the Board determines that strict enforcement of the provisions of this Code would impose an unreasonable hardship on the land and such variance will not adversely affect coastal systems, nor be in substantial conflict with the attainment of the purpose of this Code. The Board shall grant only the minimum variance necessary to permit reasonable use of the property. . . .

*Id.* This section of the Code envisions that the Board could grant Stratton a variance for repairs to the foundation and superstructure, and construction of a seawall, only if the following occurred: (1) the prohibition on construction seaward of the GBSL would have imposed an unreasonable hardship on the land; (2) the proposed repairs and seawall would not adversely affect coastal systems; (3) the proposed repairs and seawall construction would not be in substantial conflict with the attainment of the express purpose of

the Code; and (4) the proposed repairs and seawall construction were the minimum variance necessary to permit reasonable use of the property. Nowhere in these criteria is an exception or exemption provided for historic structures.

Finally, if Stratton is suggesting that any further efforts to obtain local approval for repairs were rendered moot by the Board's denial of historic designation in December 2001, then she again has misstated the facts. At best (and assuming the Board did not condition historic designation on moving and elevating the structure), denial of historic designation only limited Stratton's options to repair the landward structure in place, instead of raising it to FEMA flood elevation. The trial court properly found that the Board's resolution denying Stratton's coastal setback variance application outlined how existing use of the property for residential purposes could be preserved, through relocating or raising the structures, or by demolishing the old structures and constructing a new structure for residential use. Any effect of the denial of the historic designation itself was either remote or simply academic. The Board's decision merely frustrated Stratton's unreasonable attempt to repair the structures in place and at grade in an active surf zone.

## CONCLUSION

For the reasons stated, the petition for writ of certiorari should be denied.

Respectfully submitted,

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